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In the Supreme Court of the United States

OCTOBER TERM, 1993

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J. E. B., PETITIONER

v.

T. B.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Constitution prohibits the exercise of a peremptory challenge on the basis of a juror's gender.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Constitution bars the exercise of a peremptory challenge on the basis of a juror's gender. The Court's resolution of that issue will govern jury selection in future federal prosecutions. The government therefore has a significant interest in this case.

STATEMENT

On behalf of T. B., the mother of a minor child, the State of Alabama filed a complaint for paternity and child support against petitioner in the District Court of Jackson County, Alabama. Pet. App. A22-A23. Paternity actions in Alabama are tried before a jury.

In preparation for jury selection, the district judge assembled a panel of 36 potential jurors. *Id.* at A5. Twelve of those jurors were male; 24 were female. *Id.* at A15. After the court excused three jurors for cause, a panel of 33 jurors remained, of whom 10 were male. The State used nine of its 10 peremptory strikes to remove male jurors; petitioner used one of his 11 strikes to remove a male juror. *Id.* at A15-A16. As a result, all of the selected jurors were female. *Id.* at A16.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors on the basis of gender. Petitioner argued that gender-based peremptory challenges are invalid under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Pet. App. A2-A3. The court rejected that claim and empaneled an all-female jury. *Id.* at A3-A5. The jury found petitioner to be the father, and the court entered an order directing him to pay child support. *Id.* at A24. On post-trial motion, the court reaffirmed its ruling that *Batson* does not extend to gender-based peremptory challenges. *Id.* at A16.

The Alabama Court of Civil Appeals affirmed. Pet. App. A22-A30. Relying on Alabama precedent,[1] the court held that *Batson* does not extend to gender-based peremptory challenges. *Id.* at A24-A25. The Alabama Supreme Court denied certiorari. *Id.* at A33.

[1] See *Murphy* v. *State*, 596 So. 2d 42 (Ala. Crim. App. 1991), writ denied, 596 So. 2d 45 (Ala.), cert. denied, 113 S. Ct. 86 (1992); *Fisher* v. *State*, 587 So. 2d 1027 (Ala. Crim. App.), writ denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 112 S. Ct. 1486 (1992); *Daniels* v. *State*, 581 So. 2d 536 (Ala. Crim. App. 1990), writ denied, 581 So. 2d 541 (Ala.), cert. denied, 112 S. Ct. 315 (1991); *Dysart* v. *State*, 581 So. 2d 541 (Ala. Crim. App.), writ denied, 581 So. 2d 545 (Ala. 1991).

SUMMARY OF ARGUMENT

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court held that it violates the Equal Protection Clause for a prosecutor to exercise a peremptory challenge on the basis of a juror's race. The same equal protection principles compel the conclusion that gender-based peremptory challenges are unconstitutional.

A. As a matter of common law and legislative policy, women were barred from state and federal jury service throughout the 19th century, and for longer in many States. For most of this nation's history, the legislative policies that prevented or discouraged the participation of women on juries were deemed compatible with the Constitution. In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), however, this Court ruled that differential exemption policies that result in the exclusion of women from jury service violate the Sixth Amendment.

Taylor is consistent with the modern constitutional tenet that gender-based classifications warrant heightened scrutiny under the Equal Protection Clause. That doctrine reflects the fact that outmoded assumptions about the proper roles of men and women have no relevance to their actual abilities and qualifications. Accordingly, when government draws distinctions based on gender, it must justify them with something more than archaic stereotypes.

B. The rule announced in *Batson* governed race-based peremptory challenges, but it rested on equal protection principles that are equally applicable to challenges based on gender. *Batson* was designed not

only to protect the rights of criminal defendants, but also to protect jurors against invidious discrimination and the community as a whole from biased jury selection procedures that cast doubt on the fairness of the judicial system.

Gender discrimination in the exercise of peremptory challenges harms the excluded juror by denying him or her the opportunity for jury service for a reason that is unacceptable as a basis for government action. A statute barring women as jurors in a particular kind of case based on the notion that women characteristically think, feel, and act differently from men would plainly be unconstitutional. Under *Batson* and its progeny, a party's use of peremptory challenges to strike jurors on that basis is constitutionally invalid for the same reasons.

In addition, gender discrimination in peremptory challenges harms the community at large. If gender may be used as a proxy for beliefs and attitudes in the courtroom, the judicial system will be seen as giving credence to stereotypical views about the propensities of men and women. Moreover, gender discrimination impairs public confidence in the fairness of the judicial system. If litigants can seek, and in some cases attain, single-sex juries in the hopes of skewing the outcome of cases implicating gender issues, the judicial system is harmed by the appearance of bias.

C. The extension of *Batson* to gender will not eliminate the benefit attributed to the peremptory challenge: the enhanced appearance to the parties that the jury is composed of persons who are fair.

First, because gender does not reliably predict a juror's vote, barring gender-based challenges does

not deprive litigants of a valuable means of eliminating subtly biased jurors. A litigant may believe that male or female jurors will be biased in a particular case and would feel more comfortable with a jury that excludes them, but such personal prejudices cannot override equal protection requirements.

Second, the extension of *Batson* to gender does not suggest that all group-based peremptory challenges are unconstitutional. Gender distinctions are subject to heightened equal protection scrutiny; most groups, affiliations, and classes that might form the basis of a peremptory challenge, however, are not accorded heightened review. As to those groups, rational basis review applies, and the legitimate government interest, served by the peremptory challenge, of assuring the parties that the jury is impartial suffices to overcome the juror's equal protection interests.

Finally, the procedures that *Batson* applied to race-based challenges are also suitable for gender-based challenges. Many courts have already banned gender-based peremptories from jury selection. Experience in those jurisdictions does not suggest that a rule prohibiting gender-based strikes is unworkable.

ARGUMENT

GENDER-BASED PEREMPTORY CHALLENGES VIOLATE THE EQUAL PROTECTION CLAUSE

Peremptory challenges based on a juror's gender raise equal protection concerns similar to those raised by peremptory challenges based on a juror's race. Like race-based challenges, gender-based challenges cannot be justified as a legitimate means for obtaining a jury that is perceived to be impartial. In light of the principles of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the rights of individual jurors, and the need for the judicial system to maintain nondiscriminatory standards in jury selection, the Court should hold that gender-based peremptory challenges are unconstitutional.

A. Gender Discrimination In Jury Selection Implicates Heightened Equal Protection Concerns

1. For many years, gender discrimination was de jure in this nation's jury system. Under English common law, "women were excluded from juries based on the doctrine of *propter defectum sexus*, literally, the 'defect of sex.' " *United States* v. *De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc), quoting 3 William Blackstone, *Commentaries* *362. In this country, until the end of the 19th century, women were universally disqualified from jury service by state law. *Taylor* v. *Louisiana*, 419 U.S. 522, 533 n.13 (1975); Grace Taylor, Note, *Jury Service for Women*, 12 U. Fla. L. Rev. 224 (1959). In some States, the prohibition continued well into this century. See *Carter* v. *Jury Comm'n*, 396 U.S. 320, 323 n.2 (1970) (until 1966, only men were eligible for jury service in Alabama); *Duren* v. *Missouri*, 439

U.S. 357, 359 n.4 (1979).[2] So well entrenched was the exclusion of women from juries at the time of *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that this Court, while finding that the exclusion of black men from juries violated the Fourteenth Amendment, expressed no doubt that a State "may confine the selection [of jurors] to males." *Id.* at 310; see also *Fay* v. *New York*, 332 U.S. 261, 289-290 (1947).

By the mid-20th century, the Court recognized that the exclusion of women from juries raised issues of fairness. In *Ballard* v. *United States*, 329 U.S. 187 (1946), the Court relied on its supervisory powers over the federal courts in holding that women could not be excluded from the venire in federal trials. The Court explained, *id.* at 193-194:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was

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[2] "The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex." *Fay* v. *New York*, 332 U.S. 261, 289 (1947).

> truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Despite the views stated in *Ballard*, the Court in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), upheld a Florida law that permitted women to be included on jury lists only if they volunteered for jury service, while requiring men to apply for an exemption. The Court held that the differential exemption policies based on sex were reasonable in light of the role of women "as the center of home and family life." *Id.* at 62.

Fourteen years later, the Court repudiated the reasoning of *Hoyt*. In *Taylor* v. *Louisiana*, *supra*, the Court struck down a state statute nearly identical to that in *Hoyt* under the fair-cross-section requirement of the Sixth Amendment. The Court determined that restricting jury service to women who had volunteered could not be supported by the view that women have a distinctive role in maintaining "family life." 419 U.S. at 534 & n.13.[3] See also *Duren* v. *Missouri*, *supra* (invalidating, under the Sixth

[3] Although *Taylor* distinguished *Hoyt* by noting that it had "not involve[d] a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community," 419 U.S. at 534, the Court has since recognized that *Taylor* "in effect" overruled *Hoyt*. *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2610 n.1 (1991).

Amendment, the State's grant of an automatic exemption from jury service to any woman requesting it).

2. In requiring the inclusion of women in the venire, *Taylor* relied on Sixth Amendment principles, but the opinion's approach accords with the view that gender-based classifications are subject to heightened equal protection scrutiny. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court broke new ground under the Equal Protection Clause by invalidating a statutory preference for male over female estate administrators. In the years following *Reed*, the Court made clear that traditional views about the place of women in society do not provide a permissible basis for government action on the basis of gender. The Court struck down a statute establishing a presumption that women are dependent on their spouses, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); a statute providing that women reach majority at an earlier age than men, *Stanton* v. *Stanton*, 421 U.S. 7 (1975); and a law requiring men to be 21, but women only 18, to purchase 3.2% beer, *Craig* v. *Boren*, 429 U.S. 190 (1976).

In each case, the Court rejected governmental policies resting on "archaic and overbroad" generalizations about gender, or on "outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." *Craig*, 429 U.S. at 198. See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women"); *Caban* v. *Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (gender classi-

fications "may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes"). As this Court stated in *Planned Parenthood of Southeastern Penn.* v. *Casey*, 112 S. Ct. 2791, 2831 (1992):

> Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt* v. *Florida*, * * *. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

Because of the possibility that stereotypical assumptions are at work, the Court requires a showing under equal protection principles that a gender-based law "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982) (Fourteenth Amendment); *Davis* v. *Passman*, 442 U.S. 228, 234-235 (1979) (Fifth Amendment). Gender-based stereotypes that assume that one gender suffers from "an inherent handicap" or is "innately inferior" are an illegitimate basis for government action. *Hogan*, 458 U.S. at 725. That a state practice "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Hogan*, 458 U.S. at 723; *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Craig* v. *Boren*, *supra*.

B. The Rationale Of *Batson* v. *Kentucky* Is Applicable To Gender Discrimination

1. The Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), established the unconstitutionality of a prosecutor's use of peremptory challenges to exclude jurors on the basis of race. *Batson* overruled *Swain* v. *Alabama*, 380 U.S. 202 (1965), to the extent that *Swain* had barred a defendant from raising an equal protection challenge to the racially discriminatory use of peremptory challenges in a particular case. 476 U.S. at 100 n.25; *Powers* v. *Ohio*, 111 S. Ct. 1364, 1368 (1991). *Batson's* holding "was designed to serve multiple ends," *Allen* v. *Hardy*, 478 U.S. 255, 259 (1986) (per curiam) (internal quotation marks omitted), only one of which was the protection of the constitutional rights of criminal defendants. *Batson*, 476 U.S. at 86-88.

First, *Batson* found that the exclusion of a juror on racial grounds violates the juror's constitutional rights. "[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." 476 U.S. at 87. Second, the Court concluded that the community itself is harmed by racial discrimination in jury selection. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice," *ibid.*, and reinforce prejudices grounded in race, *id.* at 88.

Since *Batson*, the Court has made clear that in all contexts, the Constitution prohibits peremptory challenges used to eliminate jurors on the basis of race. In *Powers* v. *Ohio*, *supra*, the Court held that the defendant need not be of the same race as the ex-

cluded juror in order to raise a *Batson* objection. *Powers* rejected a requirement of racial correlation between the defendant and the excluded juror, because such a "limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." 111 S. Ct. at 1368. The Court noted that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 1370.

In *Edmonson* v. *Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), the Court extended *Batson* to civil cases, holding that civil litigants are state actors when exercising peremptory challenges and are therefore prohibited from excluding jurors on grounds of race. And in *Georgia* v. *McCollum*, 112 S. Ct. 2348 (1992), the Court ruled that *Batson* applies to peremptory challenges exercised by criminal defendants. The Court explained that "the extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts.'" *Id.* at 2353, quoting *Powers*, 111 S. Ct. at 1366.

Powers, *Edmonson*, and *McCollum* establish that, under *Batson*, the use of a peremptory challenge to exclude a juror "on account of race violates a prospective juror's equal protection rights." *Edmonson*, 111 S. Ct. at 2087; *Powers*, 111 S. Ct. at 1370; *McCollum*, 112 S. Ct. at 2353-2357. By subjecting the peremptory challenge to conventional equal protection requirements—a position that the Court had previously

rejected in *Swain* v. *Alabama*, 380 U.S. at 221-222—*Batson* and its progeny invoke constitutional principles that apply equally to gender-based challenges.

2. Gender-based peremptory challenges, like race-based challenges, are incompatible with equal protection principles. "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator* v. *Feeney*, 422 U.S. 256, 273 (1979). In exercising peremptory challenges parties draw on authority delegated by the government to select the jury. *McCollum*, 112 S. Ct. at 2354-2356; *Edmonson*, 111 S. Ct. at 2082-2087. Just as race-based peremptory challenges often rely on stereotypical assumptions that are unacceptable in a court of law, gender-based peremptory challenges often rely on stereotypical views about the attitudes and capabilities of men and women. Those views are illegitimate grounds for government action.

The use of gender-based peremptories inflicts the same harms that the Court identified in *Batson*. First, striking a juror solely on grounds of sex "harms the excluded juror." *Powers*, 111 S. Ct. at 1368; *Batson*, 476 U.S. at 87. As this Court has noted, "competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 87. Strikes based on sex, however, often reflect "gender stereotypes," such as the view that women are "generally governed by emotion, instinct, and feeling rather than reason, judgment, or common sense." *State* v. *Burch*, 830 P.2d 357, 366 (Wash. Ct. App. 1992) (rejecting prosecutor's explanation that a "full-time mother"

would be unduly sympathetic). The indulgence of such views may lead to a preference for men in some cases, see *United States* v. *Wilson*, 867 F.2d 486, 488 (8th Cir.) (prosecutor wanted male jurors for case involving street crime, because "fear factor * * * might prevent [a] female juror from voting for a verdict of guilty"), cert. denied, 493 U.S. 827 (1989); *United States* v. *Hoelscher*, 914 F.2d 1527, 1540 (8th Cir. 1990) (prosecutor wanted male jurors for narcotics case), cert. denied, 498 U.S. 1090 (1991); *Fisher* v. *State*, 587 So. 2d 1027 (Ala. Crim. App.) (prosecutor wanted male jurors for capital case), writ denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 112 S. Ct. 1486 (1992), while suggesting a preference for women in others, see *State* v. *Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (Plotkin, J., dissenting) ("The State admits that it excluded all men from the petit jury because they would tend to 'trivialize' the female defendant's sex crime * * *."), cert. denied, 540 So. 2d 338 (La. 1989).[4]

The rationales often expressed for gender-based strikes call to mind the view expressed in some cases from the prior century that "[t]he natural and proper timidity and delicacy which belongs to the female

[4] A manual formerly used to instruct Dallas, Texas, prosecutors provided the following advice: "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 210 (1989); see also *id.* at 182 & n.112 (collecting excerpts from jury-selection practice manuals revealing their authors' "unabashed misogyny").

sex evidently unfits it for many of the occupations of civil life," which are reserved for men because of "that decision and firmness which are presumed to predominate in the sterner sex." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141-142 (1873) (concurring opinion. See also *In re Goodell*, 39 Wis. 232, 245 (1875) (endorsing statutory ineligibility of women for membership in the bar, because "[t]he peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife").[5] Under modern equal protection jurisprudence, when legislatures treat men and women differently based on such archaic notions, it violates the Constitution. The

[5] Similar views were advanced in support of the statutory disqualification of women from jury service. See *Bailey* v. *State*, 219 S.W.2d 424, 428 (Ark. 1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady."); *State* v. *Hall*, 187 So. 2d 861, 863 (Miss.) ("The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them * * * from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."), appeal dismissed, 385 U.S. 98 (1966). Those justifications are plainly invalid to support statutory restrictions on the opportunity of women for jury service, and they are equally invalid to support gender-based peremptory challenges in individual cases. "A State may not draw up its jury lists pursuant to neutral procedures, but then resort to discrimination at 'other stages in the selection process.'" *Powers*, 111 S. Ct. at 1369, quoting *Batson*, 476 U.S. at 88.

same is true when litigants wield government power through the peremptory challenge in the service of anachronistic images of men and women. A State could not lawfully disqualify women from certain kinds of cases or men from others based on assumptions about their respective propensities; under *Batson* and its progeny, the State cannot permit the parties in a lawsuit to strike jurors based on the same assumptions.

Second, not only the excluded juror, but the "community at large" suffers harm from the use of gender-based challenges. *Powers*, 111 S. Ct. at 1368; *Batson*, 476 U.S. at 87. The use of peremptory challenges to restrict or eliminate one gender's participation in jury service threatens to undermine public confidence in the judicial system. Particularly when gender-related issues are prominent in a particular case, the discriminatory use of peremptory challenges may create an impression that the judicial system has acquiesced in suppressing full participation by one gender. If gender-based peremptories could be freely employed, a prosecutor could overtly attempt to eliminate all male jurors in a rape case. A corporate defendant could seek to eliminate all female jurors in a sexual harassment case. Or the State could eliminate all male jurors in a paternity case. To permit challenges to be used in that fashion appears to condone the use of gender-based stereotypes within a government institution.

Moreover, the skewing of jury panels through gender-based challenges subverts the public's perception that courts and juries are fair. Regardless of whether a panel's impartiality is actually diminished by gender-based challenges, cf. *Holland* v. *Illinois*, 493 U.S. 474 (1990), the empaneling of single-sex juries through the discriminatory use of peremptory challenges can create the appearance of bias. Citizens are likely to lack confidence in a verdict rendered by a jury chosen by discriminatory standards that would be unlawful in any other governmental institution. If a court allows jurors to be excluded on grounds reflecting racial or sexual bias, "it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Georgia* v. *McCollum*, 112 S. Ct. at 1254.[6]

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[6] Several federal and state courts have barred gender-based peremptory challenges. See *United States* v. *De Gross*, 960 F.2d 1433, 1437-1439 (9th Cir. 1992) (en banc); *State* v. *Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) (relying on state and federal constitutions); *Di Donato* v. *Santini*, 283 Cal. Rptr. 751 (Ct. App. 1991) (same), review denied (Cal. Oct. 2, 1991); *Tyler* v. *State*, 623 A.2d 648 (Md. 1993) (relying on state constitution); *People* v. *Mitchell*, 593 N.E.2d 882, 888-889 (Ill. App. 1992) (same), aff'd in part and vacated in relevant part, No. 73812 (Ill. May 20, 1993); *State* v. *Gonzales*, 808 P.2d 40, 42 (N.M. App.), cert. denied, 806 P.2d 65 (N.M. 1991) (same); *State* v. *Levinson*, 795 P.2d 845, 849 (Haw. 1990) (same); *People* v. *Irizarry*, 560 N.Y.S.2d 279 (App. Div. 1990) (same); *Commonwealth* v. *Hutchinson*, 481 N.E.2d 188, 190 (Mass. 1985) (same). But see *United States* v. *Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993); *United States* v. *Nichols*, 937 F.2d 1257, 1263 (7th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992); *United States* v. *Hamilton*, 850 F.2d 1038, 1041-1042 (4th Cir. 1988), cert. dismissed, 489 U.S. 1094 (1989), and cert. denied, 493 U.S. 1069 (1990); *State* v. *Culver*, 444 N.W.2d 662 (Neb. 1989); *State* v. *Clay*, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989); *State* v. *Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988), cert. denied, 540 So. 2d 338 (La. 1989); *State* v. *Oliviera*, 534 A.2d 867, 870

3. Theorizing that gender-based strikes are less common than the widespread use of strikes against blacks that prompted this Court's decision in *Batson*, 476 U.S. at 99; *id.* at 101 (White, J., concurring), one court of appeals has suggested that the *Swain* evidentiary formulation should continue to govern gender-based challenges. See *United States* v. *Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993). That position is unsound.

First, the *Swain* approach is no more feasible as a method for proving gender discrimination in the use of peremptory challenges than it is for proving race discrimination. As the Court observed in *Batson*, there are insuperable "practical difficulties" to tracking peremptory challenges across many cases, particularly when many jurisdictions do not record or preserve the names of jurors and the process of voir

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(R.I. 1987); Alabama cases cited at note 1, *supra* (all refusing to apply *Batson* to gender).

Many commentators have also argued in favor of extending *Batson* to gender. See Dave Harbeck, Comment, *Eliminating Unconstitutional Juries*, 77 Minn. L. Rev. 689 (1993); John S. Lapham, Note, *Gender-Based Peremptory Challenges*, 43 J. Urb. & Contemp. L. 465 (1993); Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 Harv. L. Rev. 1920 (1992); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 William & Mary L. Rev. 1027, 1052-1055 (1991); Steven M. Puiszis, Edmonson *v.* Leesville Concrete Co.: *Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause?*, 25 J. Marshall L. Rev. 37, 52 (1991); Frederick T. Kelsey, Note, *Gender Based Peremptory Challenges and the New York State Constitution*, 8 Touro L. Rev. 91, 117 (1991); Albert W. Alschuler, *supra*, 56 U. Chi. L. Rev. at 180-182; Shirley S. Sagawa, Batson *v.* Kentucky: *Will It Keep Women on the Jury?*, 3 Berkeley Women's L.J. 14 (1988).

dire. 476 U.S. at 92 n.17. Moreover, if discriminatory strikes of defendants and civil litigants, as well as prosecutors, are to be taken into account, the process would be infinitely more complicated. To remit parties to *Swain* is to condemn any claim of discrimination to failure.

Second, *Batson* declares that "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 U.S. at 95; see also *Davis* v. *Passman*, 442 U.S. at 235 & n.10 (federal right "to be free from gender discrimination" "is personal; it is [the individual], after all, who must suffer the effects of such discrimination"). If it is impermissible for parties to use gender as a basis for exercising peremptory challenges, there is no justification for requiring "several [to] suffer discrimination" before anyone can establish a claim. *Batson*, 476 U.S. at 96, quoting *McCray* v. *New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from the denial of certiorari).

In this respect, *Batson* disavowed the central premise of *Swain*. Under *Swain*, a prosecutor could legitimately strike an individual juror on the basis of race, or on an assumption of partiality based on race, in order to further the aim of "using the State's challenges to obtain a fair and impartial jury to try the case before the court." [7] 380 U.S. at 222. A constitu-

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[7] *Swain* accepted that the challenge is frequently exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." 380 U.S. at 220-221.

tional problem might develop, *Swain* suggested, only if the prosecutor systematically struck blacks "for reasons wholly unrelated to the outcome of the particular case on trial," for that would support the inference that "the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 224.

Batson, however, rejected the view that race is a legitimate basis for a strike in any case. Under *Batson*, a prosecutor may not justify a challenge "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." [8] 476 U.S. at 97. To resurrect *Swain* for gender-based challenges would therefore imply that it is permissible to remove jurors on the basis of gender, as long as there are "trial-related" reasons for doing so in a particular case. Equal protection principles forbid such invidious action on the basis of gender—particularly in cases that may pose the greatest temptation to succumb to gender stereotypes.

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[8] The dissenters in *Batson* clearly identified the departure from *Swain*. See 476 U.S. at 134, 135 (Rehnquist, J., joined by Burger, C.J., dissenting) ("[T]he Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. * * * [In *Swain*,] the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection.").

C. The Extension Of *Batson* To Gender Will Not Frustrate The Utility Of The Peremptory Challenge

1. A ruling that litigants may not strike potential jurors solely because of gender does not conflict with a State's "legitimate interest" in allowing peremptory challenges: "the assurance of impartiality that the system of peremptory challenges has traditionally provided." *Holland* v. *Illinois*, 493 U.S. at 483; *Swain* v. *Alabama*, 380 U.S. at 219 (purpose of the peremptory challenge is to further "the rule that to perform its high function in the best way justice must satisfy the appearance of justice"). A requirement of gender neutrality in the exercise of peremptory challenges does not prevent parties from removing jurors who they reasonably believe to be truly biased, but who were not excused for cause; it simply eliminates gender as a proxy for presuming bias.[9]

Depriving a party of the right to strike jurors based on gender in no way impairs the party's ability to obtain an impartial jury. Most studies have found that gender is not a good predictor of a juror's vote.[10]

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[9] What a ban on gender-based strikes prohibits is basing the strike on gender alone. It is quite different, however, for a party to exercise a peremptory challenge based on a characteristic of a person that may be disproportionately associated with one gender, but that the party believes has a bearing on juror performance. For example, challenging all persons who have had military service would disproportionately affect men, while challenging all persons employed as school teachers would disproportionately affect women. Absent a showing of pretext, however, those bases for challenges are not constitutionally suspect, since they are not gender-based. See *Hernandez* v. *New York*, 111 S. Ct. 1859 (1991).

[10] See Valerie P. Hans & Neil Vidmar, *Judging the Jury* 76 (1986) ("[I]n the majority of studies there are not significant differences in the way men and women perceive and

But even if gender were a good predictor of juror performance in some cases, the characteristics or backgrounds that are thought to make women "good" jurors for one side or "bad" jurors for another are factors that are likely to be shared by many, but not all, women, and some, but not all, men. If conducted properly, voir dire examination of the prospective jurors should provide the parties with the means to identify the underlying characteristics or background factors that are thought to make particular jurors favorable or unfavorable, without requiring the parties to rely on the proxy of gender.

Quite apart from what is learned through voir dire, a litigant may surmise that jurors of one gender would likely harbor unspoken biases and may feel more comfortable with a panel that excludes them. The desire to strike based on such subjective feelings, however, is insufficient, unless courts are to accept as a defense to gender discrimination "the very stereotype the law condemns," *Powers*, 111 S. Ct. at 1370. The peremptory challenge is not of constitutional di-

react to trials; yet a few studies find women more defense-oriented, while still others show women more favorable to the prosecutor."); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* 140 (1983) ("The individual difference that has received the most attention by empirical researchers is juror gender. * * * Neither student nor citizen judgments for typical criminal case materials have revealed differences between male and female verdict preferences. * * * The picture differs for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors."); 1 Francis X. Busch, *Law and Tactics in Jury Trials* § 149, at 831-832 (1959) ("In this age of general and specialized education, availed of generally by both men and women, it would appear unsound to base a peremptory challenge in any case upon the sole ground of sex.").

mension. *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). In *Georgia* v. *McCollum*, 112 S. Ct. at 2357-2358, this Court acknowledged the value of the peremptory challenge, yet held that its benefits do not outweigh the constitutional right of jurors to be free from racial discrimination. While expressing doubt that the extension of *Batson* to criminal defendants would "undermine the contribution of the peremptory challenge to the administration of justice," *id.* at 2358, the Court declared that, even if it did, the price of tolerating race-based strikes is "too high to meet the standard of the Constitution." *Ibid.*, quoting *Edmonson*, 111 S. Ct. at 2088. The constitutional cost of tolerating gender-based exclusions is similarly too high.[11]

2. The extension of *Batson* to gender does not suggest that all group-based challenges are incompatible with equal protection principles. It is true that litigants frequently rely on group characteristics

[11] In some cases, prosecutors have struck jurors of one gender in order to achieve a more balanced panel or to assure that members of both sexes serve on the jury. See *United States* v. *De Gross*, 960 F.2d at 1443 & n.14; *United States* v. *Hamilton*, 850 F.2d at 1041. In theory, that purpose is consistent with the underlying reason for ensuring that both men and women are included in jury venires—to obtain the "subtle interplay of influence one on the other." *Taylor* v. *Louisiana*, 419 U.S. at 532, quoting *Ballard* v. *United States*, 329 U.S. at 193. It would be quite difficult, however, to administer a rule that treated some reasons for gender-based strikes differently from others. Moreover, because a defendant's challenges are also governed by the requirements of equal protection, *Georgia* v. *McCollum*, *supra*, a prosecutor should not have to engage in gender-based strikes in order to counterbalance defense efforts to skew the jury.

such as a juror's age, affiliations, marital status, occupation, or place of residence in exercising peremptory challenges. This Court, however, has never held the vast majority of group classifications that litigants may employ in exercising peremptories to be "suspect" in equal protection terms.

While classifications based on race or national origin are generally subject to strict equal protection scrutiny, and classifications based on gender and illegitimacy are judged according to an intermediate yet heightened level of review, social or economic classifications are constitutionally valid if they survive the highly deferential rational basis test. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). The Court has declined to apply heightened scrutiny, for example, to groups defined by age, physical disability, or mental retardation, *Cleburne*, 473 U.S. at 440-441, 442-447, and has voiced its "reluctan[ce] to set out on [a] course" that would multiply the number of suspect classes. *Id.* at 446.

Thus, with respect to groups that are not treated as suspect or quasi-suspect classes for equal protection purposes, the Constitution requires only that the government act rationally to further a legitimate state interest in allowing the strike. *Cleburne*, 473 U.S. at 440-441. The peremptory challenge system satisfies that test. The government's interest in having the parties perceive that they are receiving a fair trial by impartial jurors is a legitimate one, and the allowance of peremptory challenges is a rational way to further that purpose. Accordingly, the peremptory challenge system is valid as applied to categories of

persons normally subject to rational basis equal protection review.[12]

3. Finally, allowing gender-based *Batson* claims will not hamstring the exercise of all challenges or unduly bog down the process of jury selection. Experience in the many jurisdictions that have barred gender-based challenges (see note 6, *supra*) does not support the view that litigants and trial courts are incapable of complying with a rule barring strikes based on gender.

As with race-based *Batson* claims, a party alleging a gender-based claim must make a prima facie showing of discrimination before the party exercising the challenge is required to explain the basis for the strike. Such a showing is not automatic. Where the case does not implicate gender-related issues or involve a grossly disproportionate number of strikes directed at one gender, courts may appropriately hesitate to draw an inference of discrimination simply from the fact that several jurors of one gender have

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[12] See *United States* v. *De Gross*, 960 F.2d at 1438 n.8 (equal protection implications of race and gender distinguish those reasons for strikes "from other factors that are not improper bases for exclusion from juries, for example, one's occupation"); Note, *supra*, 105 Harv. L. Rev. at 1928, 1935 (relying on different levels of scrutiny under the Equal Protection Clause in concluding that peremptories based on age or occupation are permissible); Dave Harbeck, Comment, *supra*, 77 Minn. L. Rev. at 714-715 & n.178 (stereotypes are permissible bases for strikes against persons who are not members of classes entitled to heightened scrutiny; for example, a prosecutor may exclude a professor on the belief that "all professors are willing to give criminals a second chance").

been struck. Cf. *Powers* v. *Ohio*, 111 S. Ct. at 1373-1374 (noting that factors bearing on whether there is a prima facie case may vary according to whether there is reason in a particular case to be concerned about the possible discriminatory use of strikes). And when an explanation is required, it does not have to rise to the level of a "for cause" challenge; it simply must be based on a juror characteristic other than gender (or other protected characteristic). See *Hernandez* v. *New York*, 111 S. Ct. 1859, 1866-1868 (1991) (plurality opinion) (discussing requirements for race neutrality under *Batson*).

Although some have speculated that an extension of *Batson* to gender would work a "practical frustration" of the challenge by imposing an onerous requirement of explanation for every strike, see *United States* v. *Broussard*, 987 F.2d at 219, that concern is overstated. The same fears were raised by the State in *Batson* itself. The Court, however, determined that its holding "enforces the mandate of equal protection and furthers the ends of justice" in eliminating race-based strikes, and that trial courts are competent to implement the *Batson* procedures. 476 U.S. at 99. There is no reason to draw a different conclusion with respect to gender.

CONCLUSION

The judgment of the Court of Civil Appeals of Alabama should be reversed.

Respectfully submitted.

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